

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



FOR THE SECOND CIRCUIT

Docket No. 74-2153

KAMA RIPPA MUSIC, INC.,

Plaintiff-Appellant,

-against-

MS. MELANIE SCHEKERYK,

Defendant-Appellee,

-and-

MS. MELANIE SCHEKERYK and  
PETER SCHEKERYK, individually  
and d/b/a AMELANIE MUSIC,

Defendants.

\* \* \* \* \*

MELANIE SCHEKERYK,

Counterclaimant-Appellee,

-and-

MS. MELANIE SCHEKERYK and PETER  
SCHEKERYK, individually and d/b/a  
AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC.,

Counterdefendant-Appellant,

-and-

KAMA SUTRA MUSIC, INC. and  
BUDDAH RECORDS, INC.,

Counterdefendants.

On Appeal from an Order of the United States District Court  
for the Southern District of New York

(73 Civ. 3789)

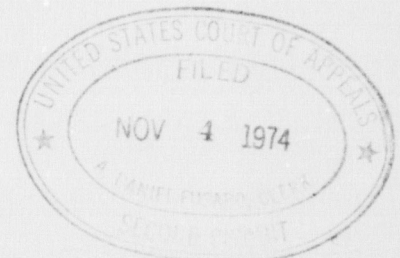
BRIEF FOR PLAINTIFF-APPELLANT

KAMA RIPPA MUSIC, INC.

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## STATEMENT OF THE CASE

### 1. Preliminary Statement

This is an appeal, pursuant to 28 U.S.C. §1291, from (1) an Order, dated July 30, 1974 of the Honorable Whitman Knapp, Judge of the United States District Court for the Southern District of New York, denying reargument of the Court's Order and Judgment, dated July 16, 1974 and (2) from the Court's Order and Judgment, dated July 16, 1974, granting the motion, pursuant to Fed. R. Civ. P. 56(c), of defendant-counterclaimant Ms. Melanie Schekeryk for summary judgment on her second and third counterclaims against plaintiff-appellant Kama Rippa Music, Inc.

### 2. Prior Proceedings

This action was commenced in the United States District Court for the Southern District of New York by Kama Rippa Music, Inc. ("Kama Rippa") against Melanie Schekeryk ("Melanie") and Peter Schekeryk ("Schekeryk"), individually and d/b/a Amelanie Music ("Amelanie"). The complaint\* seeks money damages for Melanie's breach of contract with Kama Rippa.

Melanie's answer generally denied the material allegations of the complaint and interposed a collective total of fourteen counterclaims against Kama Rippa and two affiliated companies, Kama Sutra Music, Inc. ("Kama Sutra") and Buddah Records, Inc. ("Buddah"). Insofar as the instant proceeding is concerned, three of Melanie's counterclaims against Kama Rippa were grounded in Kama Rippa's

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\* Leave of this Court will be sought, pursuant to Fed. R. App. P. 30(c), to serve a deferred Appendix.

purported breach of a Songwriter's Agreement resulting from its withholding of royalties allegedly due to Melanie.

The relief sought by Melanie was a declaratory judgment that all rights to certain musical compositions delivered to Kama Rippa by Melanie had reverted to her as a result of the purported breach, and a mandatory injunction perpetually restraining and enjoining Kama Rippa from holding itself out as having any interest in those compositions or from collecting or receiving any monies in connection therewith. Additionally, Melanie sought an accounting of all monies due to her pursuant to the Songwriter's Agreement.

After service of Melanie's answer, Kama Rippa moved to dismiss the counterclaims for, inter alia, failure to state a cause of action, and Melanie cross-moved for summary judgment on her counterclaims.

By Memorandum Decision, dated July 16, 1974, the Honorable Whitman Knapp denied Kama Rippa's motion to dismiss and granted Melanie's motion for summary judgment on the second and third counterclaims. The Court's Order and Judgment ("Judgment"), entered on July 22, 1974, provided for a stay of execution of all proceedings to enforce the terms of the Judgment for a period of ten days pending Kama Rippa's filing of a motion for reargument.

Thereafter, by Notice of Motion dated July 26, 1974, Kama Rippa moved, pursuant to Rule 9(m) of the General

Rules of the District Court, for an order granting reargument of the Court's decision and, upon such reargument, reversing its opinion and granting summary judgment in favor of Kama Rippa. Alternatively, Kama Rippa sought the modification of the Court's opinion to include compensation to Kama Rippa for expenditures made by Kama Rippa which resulted in the increased value of the reverted copyrights. Additionally, Kama Rippa moved, pursuant to Rule 62(h) of the Federal Rules of Civil Procedure, for an order granting a stay of enforcement of the Court's order upon reargument pending entry of a judgment after appeal to the United States Court of Appeals for the Second Circuit.

By Order dated July 30, 1974, Judge Knapp denied the requested relief in all respects, and, on August 22, 1974, Kama Rippa filed its Notice of Appeal from the Order of the Court denying Kama Rippa's motion for reargument.

Subsequently, Kama Rippa moved unsuccessfully before this Court for an Order granting a stay of enforcement of the terms of the Judgment pending appeal.

### 3. Statement of Facts

In early 1968, after an undistinguished and unprofitable contractual relationship with another recording company, Melanie, a songwriting and performing musical artist, through her personal manager at the time, Stanley R. Poses ("Poses"), entered into negotiations for her varied and related services with representatives of Kama Rippa.

These negotiations were fruitful and ripened, commencing May, 1968, into a series of written agreements. It is to be noted at the outset that the several individual agreements ultimately agreed upon among the parties represented the common practice of the popular music industry wherein song-writing, publishing and recording are intimately related and set forth in separate documents (Levy Aff't, ¶¶3-9)\*. It is to be further noted that in the popular music field the publishing rights in musical compositions derive their value primarily from successful popular recordings and, in fact, popular music publishers frequently do not publish any sheet music by an artist-composer until that artist has had a hit record (Franklin Aff't, ¶¶6-10).

Consistent with industry practice the first agreement executed by the parties was the Songwriter's Agreement, whereby Kama Rippa agreed to publish certain musical compositions created by Melanie and also agreed to divide the resulting royalties pursuant to a complicated formula. Melanie's share of royalties was to be paid twice a year, in February and August, to cover the six-month periods ending the preceding December and June. According to the estimate of Arthur Kass, President of Kama Rippa, the copyrights for these musical compositions are worth approximately \$500,000.

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\* References, unless otherwise indicated, are to affidavits submitted in support of Kama Rippa's Motion For Reargument which will be reproduced in Kama Rippa's appendix.

The Songwriter's Agreement also provided that Melanie was to submit a specified number of musical works (§14) and that her services were

"unique, exceptional and extraordinary and in the event of any breach by... [Melanie]...of any of...[her]...undertakings or obligations under this agreement,...[Kama Rippa]...shall be entitled to an injunction to enforce the same in addition to any other remedies available...." (§2)

Several riders, the majority of which were made at the request of Melanie and were the result of long and extensive negotiations among the four people\* who negotiated each of the three contemporaneous and interdependent agreements were executed by the parties and affixed to the Songwriter's Agreement.

One such rider (to §6), which was inserted at the insistence of Melanie, included a provision that timely payment of royalties was to be "of the essence", and that if timely payment was delayed or became

"impossible or impractical by reason of any act of God, fire, earthquake, strike, labor disturbance, civil commotion, acts of government, its agencies or officers, any order, war (whether or not unofficially declared) regulation, ruling or action of any labor union or association of composers or employees affecting publisher or the

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\* The four people who negotiated the Songwriter's Agreement and the Co-Publishing Agreement, each dated May 31, 1968, and the Artist Recording Agreement, dated October 28, 1968, were Arthur Kass ("Kass") and Joseph Zynczak, Esq. ("Zynczak"), on behalf of Kama Rippa and its affiliated companies, and Stanley Poses ("Poses") and Howard Beldock, Esq. ("Beldock"), on behalf of Melanie.

industry in which it is engaged or delays in the delivery of material and supplies, or for any similar or dissimilar reason publisher may, upon notice to writers, suspends (sic) its obligations, including its obligations to make payments hereunder for the duration of such delay, impossibility, impracticability, as the case may be."

The affidavits of Kass, Zynczak and Poses, the only persons with first-hand knowledge of the Songwriter's Agreement and its riders, averred unequivocally that the Songwriter's Agreement and its riders provided that the making of royalty payments to Melanie was not an absolute obligation but was contingent upon Melanie's full and complete performance of all contractual obligations (Kass Aff't, ¶¶5-9; Zynczak Aff't, ¶¶9-14; Poses Aff't, ¶¶5-14). This understanding exists throughout the popular music business (Levy Aff't, ¶17). The use of riders was merely a timesaving device. There was no intention to give the riders any greater or less significance than any of the other terms in the agreements; nor was it intended to set the content of the riders apart from the rest of the agreements (Kass Aff't, ¶19; Zynczak Aff't, ¶12; Poses Aff't, ¶¶9 and 14). It is the standard practice in the music industry to use riders to avoid retyping an entire agreement and thus to save time. Such riders are considered integral parts of the underlying agreements (Levy Aff't, ¶16).

As part of the entire contractual relationship by which Kama Rippa sought to contract for all of Melanie's artistic talents, Kama Rippa also entered into a co-publishing agreement ("Co-Publishing Agreement") with Melanie. The precise terms of that agreement are not pertinent to this appeal.

Several months later, the parties entered into a third agreement, a recording agreement ("Artist's Recording Agreement"). Pursuant to that agreement, Melanie was required to record and Buddah was required to release a certain number of records which were to be submitted by Melanie pursuant to the Songwriter's Agreement. Also, that Agreement provided that Buddah's obligation to release Melanie's recordings was "of the essence." The Artist's Recording Agreement was part and parcel of and its terms interdependent with the earlier agreements entered into among the parties.

The meaning of these agreements and the fact that they are to be read together creating a complex set of reciprocal obligations is obvious to those who are familiar with the customs, practices, usages and terminology in the recording industry. These facts are clearly set forth in the uncontradicted affidavits of Morris Levy, President of Roulette Records, Philip Kahl ("Kahl"), Vice President of Big Seven Music Corporation, Jeffrey A. Franklin, President of American Talent International, Ltd., and Irwin Schuster

("Schuster"), Vice President and Director of Professional Activities of Screen Gems, Columbia and Colgems Music, each of whom unquestionably is expert in the field and familiar with the common and usual practices of the music recording industry.

After the execution of the agreements, differences arose among the parties when Melanie and her husband, defendant Peter Schekeryk ("Schekeryk"), sought to become associated with another recording company, Paramount Records. As a result of these differences, Melanie and Buddah, among others, executed an agreement which, so far as is here relevant, gave Paramount all rights and obligations relative to Melanie's future services while retaining for Buddah all rights with respect to prior recordings, subject to the obligation to pay royalties.

Difficulties again arose among the parties as a result of Melanie's failure to meet her musical composition delivery requirements, with the result that in August, 1971, Melanie and Kama Ripa entered into yet another agreement ("Amendatory Agreement"). This Agreement purportedly settled a dispute which had arisen concerning Melanie's failure to deliver musical compositions pursuant to the Songwriter's Agreement. The Amendatory Agreement provided, inter alia, that Melanie was to record at least three songs within the two-year period.

Subsequently, disputes between the parties arose for the third time when Melanie again failed to satisfy the delivery requirements of the Amendatory Agreement. Instead of delivering three records as she contracted to do, Melanie prepared and submitted three demonstration tape recordings involving only a piano and vocal. (Schuster Aff't, ¶¶1-2)

As a result of Melanie's breach of her obligations under the Amendatory Agreement, Kama Rippa withheld royalties which fell due on August 15, 1973 under the Songwriter's Agreement, whereupon Melanie demanded payment, asserted her rights under the "of the essence" rider to the 1968 Songwriter's Agreement, and ultimately declared the copyrights forfeited by Kama Rippa.

On August 31, 1973 Kama Rippa commenced this action to obtain Melanie's compliance with the terms of the 1971 Amendatory Agreement.

Also, on September 18, 1973, Kama Rippa commenced an action in the Supreme Court of the State of New York, New York County, and therein obtained an Order of Attachment which attached Kama Rippa's indebtedness to Melanie pursuant to the Songwriter's Agreement. Thereafter, for reasons more fully set forth, infra, Point IV, the order of attachment was vacated and Kama Rippa paid Melanie certain royalties due at that time.

After commencement of this action, Kama Rippa moved before Judge Knapp for an order dismissing Melanie's counter-claims and Melanie cross-moved for summary judgment on three

of her counterclaims against Kama Rippa on the grounds that there were no genuine issues of material fact present with respect to the obligation of Kama Rippa to pay royalties. Thus, Melanie sought a declaration that all rights in compositions previously submitted by her to Kama Rippa, pursuant to her agreements with Kama Rippa, had reverted to her.

Melanie also sought to have the District Court dismiss Kama Rippa's complaint for failure to state a cause of action.

On July 16, 1974, Judge Knapp filed his Memorandum Decision granting Melanie's cross-motion for summary judgment on the ground that there existed no genuine issues of material fact regarding Kama Rippa's obligation to pay royalties independent of her contractual obligations to Kama Rippa (Opinion, p. 10).

At the same time, Judge Knapp denied that portion of Melanie's motion which sought dismissal of Kama Rippa's complaint on the ground that an evidentiary hearing was required as proper interpretation of the Amendatory Agreement required consideration of trade practices and the parties' understanding of the words used in that Agreement (Opinion, pp. 8-9).

Thereafter, Kama Rippa moved for reargument of the Court's Judgment and submitted in support of the motion affidavits of Kass, Zynczak and Poses, three of the four individuals who alone negotiated the Songwriter's Agreement.

The single person who did not submit an affidavit was Beldock who declined to do so and cited his attorney-client privilege (Exhibit D to Halsey affidavit, sworn to July 26, 1974).

On July 30, 1974 Judge Knapp denied Kama Rippa's motion for reargument finding the language to be unambiguous and not subject to variation by parole evidence (Order, pp 1-2).

As is more fully set forth hereinafter, the District Court erred in not taking into account the thrust and effect of the affidavits of those who were the only ones familiar on a first-hand basis with execution of the relevant agreements, as well as the affidavits of those experts who are cognizant of those customs, practices, usages and terminology of the popular music recording business. Kass, Zynczak, Poses, Levy and Franklin show by their affidavits that the words used are capable of more than one meaning when viewed by reasonably intelligent persons (Levy, Franklin, Schuster) who examined the context of the entire integrated agreements as generally understood in the music recording business.

The District Court incorrectly viewed the submission of these affidavits as an attempt to change the written word of the agreements. This was not the purpose of the affidavits submitted below. Rather, the purpose of those affidavits was merely to delineate a correct commercial backdrop for intelligent interpretation of the agreements. It is on this error that the instant appeal is based by Kama Rippa.

## ARGUMENT

### POINT I

THE PARTIES UNDERSTOOD ALL OF THE AGREEMENTS TO BE MUTUALLY INTERDEPENDENT CONTRACTS, THE BREACH OF ONE UNDOING THE OBLIGATIONS OF THE OTHER AGREEMENTS.

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At the outset, it is to be noted that whether the parties intended to treat all the agreements as mutually interdependent contracts, the breach of one obligation undoing the obligations under the other agreements, is a question of fact. Rudman, et al. vs. Cowles Communications, Inc., et al., 30 N.Y.2d 1, 330 N.Y.S.2d 33 (1972). As the New York Court of Appeals noted, Ibid, 30 N.Y.2d at 13:

"in determining whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances."

There is no presumption that each agreement was meant to be an entire contract rather than a separable or divisible contract. Bird v. Computer Technology, Inc., 364 F.Supp. 1336, 1342 (S.D.N.Y. 1973).

See also, Ripley vs. International Rys of Cent. Amer., 8 N.Y.2d 430, 437-38, 209 N.Y.S.2d 289, 292-93; Hallmark Synthetics Corp. vs. Sumitomo Shoji, New York, Inc., 26 A.D. 2d 481, 275 N.Y.S.2d 587 (1 Dept. 1966); 6 Williston, Contracts, Section 863 (3 Ed.).

Thus, Melanie's motion for summary judgment should have been denied if for no other reason than that the inter-relationship of the provisions of the several agreements was in dispute and presented a genuine issue of material fact.

And, if there is any doubt in this conclusion, it should be resolved in favor of Kama Ripa, for according to the language of the United States Supreme Court in United States vs. Diebold, Inc., 369 U.S. 654, 655 (1962):

"On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

The fact that all the agreements were not executed on the same day or by the identical parties does not change this result.

New York law, which is applicable in this diversity action, requires, in order to determine the interrelation of the agreements, that:

"all writings that form part of a single transaction and are designed to effectuate the same purpose be read together, even though they were executed on different dates and were not all between the same parties." Gordon v. Vincent Youmans, Inc., 358 F.2d 261, 263 (2d Cir. 1965).

Similarly, this Court sustained the opinion of the District Court in Kurz vs. United States, 156 F.Supp. 103 (S.D.N.Y. 1957), an action in which the District Court applied the law of New York and read together as one document a separation agreement between a decedent and his wife, dated

October 16, 1931, and a trust instrument between decedent and his trustee, dated December 4, 1931. This Court observed, in affirming per curiam, that:

"It is both good sense and good law that these closely interrelated and nearly contemporaneous documents be construed together." Kurz v. United States, 254 F.2d 811, 812 (2 Cir. 1957).

To the extent that the rule in New York includes a consideration of the time lapse between instruments not simultaneously executed, the test is a flexible one.

In Nau vs. Vulcan Rail and Construction Company, Ibid, 286 N.Y. 188, at 197 (1941), the New York State Court of Appeals read together three separate agreements to determine whether a defendant was liable for expenses incurred by a plaintiff in defending a patent interference proceeding. The New York Court of Appeals concluded that the three agreements

"were executed at substantially the same time, related to the same subject matter, were contemporaneous writings and must be read together as one."

Accordingly, when it is kept in mind that it was Kama Rippa's intention from the very outset to acquire the diverse, multi-faceted talents of Melanie as an artist-composer, it is clear that the Songwriter's Agreement properly should have been read together with the contemporaneous Co-Publishing Agreement and the subsequent Artist's Recording Agreement. This conclusion is inescapable when it is understood that pursuant to those agreements considered collectively, royalties

were to be paid after delivery of Melanie's musical compositions to Kama Rippa which was obligated to use its efforts to distribute and sell those works.

Parenthetically, it is to be noted that these agreements had to be renegotiated twice as a result of Melanie's failure to perform her obligations to deliver musical compositions.

The language of the Amendatory Agreement incorporating the rights and obligations of the parties to the prior agreements bears directly on the true meaning to be given to the language of the rider to paragraph 6 of the Songwriter's Agreement today and does not contradict the continued interdependence of the various agreements. The specific language is:

"Reference is hereby made to our Co-Publishing Agreement of May 31, 1968 and our exclusive Songwriter's Agreement of May 31, 1968:

"In connection therewith, we hereby agree that the delivery of a total of twenty (20) musical compositions wholly written by Melanie Schekeryk to us under and pursuant to a Songwriters and Co-Publishing Agreement aforesaid...."

Clearly, the language of this Amendatory Agreement was meant to relate to, and incorporate the delivery obligations of, the prior Songwriter's Agreement. It was not meant to discharge Melanie from all her other obligations. This would have been totally inconsistent with the purpose of Kama Rippa in obtaining Melanie's talents from the very beginning.

With respect to the Amendatory Agreement, Judge Knapp denied summary judgment and quite correctly found there existed genuine issues of material fact concerning Melanie's performance of her agreement obligations (Opinion, pp 8-9). The Court, however, erroneously failed to apply that factual presence to the interdependent Songwriter's Agreement. The case of H.K. Porter Co. vs. Wire Roper Corporation of America, Inc., 367 F.2d 653 (8 Cir. 1966) is illustrative of this point.

In that case an appellant asserted reversible error on the part of a trial court in admitting extrinsic and parole evidence as to the meaning of a sale contract which the appellee considered to be unambiguous and of clear meaning. The Court correctly noted that if a contract is clear, definite and certain, so that the intent of the parties can be spelled therefrom, the provisions thereof are binding and controlling and had to be accepted "without references to any rules of interpretations." But, the Court went on to note that the application of the language used, i.e., whether the contractual obligation was to be retroactively applied, was in doubt and therefore required an evidentiary hearing.

In the instant proceeding, the Court incorrectly foreclosed the relationship between the writings. Although some disagreement exists in other jurisdictions concerning the degree of specific reference between the documents required, the construction which is applicable in this jurisdiction is that a sufficient connection between the writings is established simply by a reference in them to the same general transaction.

In the words of the New York State Court of Appeals, the statute (of frauds) is not pressed "to the extreme of a literal and rigid logic," Marks v. Cowdin, 226 N.Y. 138, 144, 123 N.E. 139, 141, and all testimony is admitted to show the connection between the documents. See Beckwith vs. Talbot, 95 U.S. 289, 24 L. Ed. 496; Oliver vs. Hunting, 44 Ch. pp. 205, 208-9; See also, 2 Corbin, Section 512-18.

Of particular significance in this area is the compelling language quoted by the United States Supreme Court from the opinion of the New York State Court of Appeals in Crabtree vs. Elizabeth Arden Sales Corp., 305 N.Y. 48, 110 N.E.2d 551 (1953). In that case the United States Supreme Court noted that statutes of frauds should not themselves aid and abet in the perpetration of frauds:

"True, the possibility still remains that by fraud or perjury, an agreement never in fact made may occasionally be enforced under the subject matter or transaction test. It is better to run that risk, though, than to deny enforcement to all agreements merely because the signed document made no specific mention of the unsigned writing. As the United States Supreme Court declared, in sanctioning the admission of [parol] evidence to establish the connection between the signed and unsigned writings: 'There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such [parol] proof. If there is no ground for any doubt in the matter, the general rule should be enforced. But where there is ground for doubt, its enforcement would aid instead of discouraging fraud.'" (Emphasis supplied) Beckwith vs. Talbot, 95 U.S. 289, 292, 24 L. Ed. 496.

Also, see Kirtley, etc. vs. Abrams, et al., 299 F.2d 341, 346-7 (2d Cir. 1962) where Judge Henry J. Friendly of this Court ruled it was reversible error to exclude from evidence certain testimony and writings between the parties -- including an unexecuted draft agreement -- relating to the true intention of the parties in executing a challenged writing.

Finally, in Ackerman, Inc. v. Mohawk Cabinet Co., Inc., 37 A.D.2d 655, 396 N.Y.S.2d 396, 398 (3 Dept. 1971), the Court considered the interrelation of a letter agreement which was in positive terminology, left nothing further to be agreed upon and did not appear to be tentative in any respect with a transmittal letter which referred to the agreement as a "proposal" agreement. The Court correctly noted that:

"These letters pose a basic question as to what was the intent of the parties (Matter of Ahern v. South Buffalo Ry. Co., 303 N.Y. 545, 548, 194 N.E.2d 898, 900 affd. 344 U.S. 367, 73 S.Ct. 340, 97 L. Ed. 395). Where the intent of the parties is not unequivocally clear, we must glean intent from the sense in which words were used, the relation of the parties, the resolution of conflicting inferences, if any, and other surrounding circumstances. This inquiry involves both questions of law and fact (Kenyon v. Knights Templar & Masonic Mut. Aid Assn., 122 N.Y. 247, 254, 25 N.E. 299, 300), and is not properly dealt with by summary judgment. (See Lachs v. Fidelity & Casualty Company of New York, 306 N.Y. 357, 118 N.E.2d 555; Berg v. Auto Wheel Industries, 32 A.D.2d 876, 301 N.Y.S.2d 650.)" (Emphasis supplied.)

The rationale behind the relaxation of the Statute of Frauds in considering the interrelation of written and unwritten agreements should be applied here where the parties have executed integrated written agreements. Consequently, extrinsic evidence should have been admitted and accepted by the Court below.

POINT II

EXTRINSIC EVIDENCE IS ADMISSIBLE TO  
EXPLAIN THE MEANING OF THE AMBIGUOUS  
LANGUAGE OF THE SONGWRITER'S AGREEMENT

It is not denied by Kama Rippa that the general rule is that evidence of a prior or contemporaneous oral agreement or understanding which would tend to contradict or to vary the terms of a written agreement is not competent evidence and will be excluded by a Court.

That, however, is not the question raised by the facts and circumstances of this action. Rather, the threshold question raised by this appeal is simply whether Kama Rippa is entitled to introduce extrinsic evidence from which the meaning of the promise made may be discovered.

In the circumstances of this case, it is perfectly clear that the evidence proffered by Kama Rippa's experts was competent and should have been considered by the Court below. If the District Court had done this, it would have been perfectly clear that the royalty-payment clause was interdependent with Melanie's performance of her contractual obligations and Melanie's motion for summary judgment should have been denied.

Initially, of course, the fundamental aim in the interpretation of contracts is to ascertain the actual intent of the parties as reflected by their contract language,

Corbin, Contracts, Section 545 at p. 140. In seeking to do this, one must look to what was or should have been reasonably apparent to the contracting parties. And, if the language of a contract is ambiguous, to aid in interpretation the Court can look to all of the surrounding circumstances, including the parties' conduct, statements of their representatives and the past practices between the parties. Warner-Lambert Pharmaceutical Co. vs. John J. Reynolds, Inc., 178 F.Supp. 655, 667 (S.D.N.Y. 1959), aff'd per curiam, 280 F.2d 197 (2d Cir. 1960); Rotberg vs. Dodwell & Co., 152 F.2d 100 (2d Cir. 1945); 3 Corbin, Contracts, Section 558 (Rev. Ed. 1960); United Electrical, Radio and Machine Workers of America, etc. vs. General Electric Company, 208 F.Supp. 870 (S.D.N.Y. 1962).

An "ambiguous" word or phrase, as defined by Judge Mansfield in Eskimo Pie Corp. vs. Whitelawn Dairies, Inc., etc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968), is one

"capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business. Fox Film Corp. v. Springer, 273 N.Y. 434 (1937)."

And,

"Unless the language is meaningless on its face (e.g., 'abracadabra') or ambiguous, however, the test for admission or parol evidence is not as a secret code meaning given to it by the parties but whether it might objectively be recognized by a reasonably intelligent person acquainted with applicable customs, usages and the surrounding circumstances as having such a special meaning. Id., 284 F.Supp., at 995." (Emphasis supplied.)

A close reading of the pertinent provisions of the Songwriter's Agreement, the Artist's Recording Agreement and the Amendatory Agreement indicates that the meaning of the challenged language is ambiguous at best. In the words of Judge Bryan in his opinion in Bartsch vs. Metro-Goldwyn-Mayer, Inc., 270 F. Supp. 896, 899 (S.D.N.Y. 1967) the

"words used by the parties in this crucial document are hardly so 'plain and clear' as to exclude proof of surrounding circumstances and any extrinsic aids to interpretation."

For example, the rider to paragraph 6 of the Songwriter's Agreement provides numerous reasons which would legitimately entitle Kama Ripa to withhold payment of royalties to Melanie. The language under consideration, in pertinent part, reads as follows:

"if performance of Publisher's obligation under this Agreement is delayed or becomes impossible or impractical by reason of any act of God, fire, earthquake, strike, labor disturbance, civil commotion, acts of government, its agencies or officers, any order, war (whether or not unofficially declared) regulation, ruling or action of any labor union or association of composers or employees affecting Publisher or the industry in which it is engaged or delays in the delivery of material and supplies, or for any similar or dissimilar reason Publisher may, upon notice to writers, suspend (sic) its obligations including its obligations to make payments hereunder or the duration of such delay, impossibility, impracticability, as the case may be."

In interpreting the specific language "or dissimilar reasons", the District Court held that the cited language had "no rational meaning and should be ignored." (Opinion, p. 10)

This was an error under the circumstances of this action for all language of a contract should be given effect and no terms should be considered as meaningless. Northwest Marine Iron Works v. United States, 493 F.2d 652 (6 Cir 1974). Moreover, by adopting such a construction "each provision of the Contract is given a reasonable effect." Bruns Kimball & Co. v. National Pressure Cooker Co., 83 F.Supp. 258, 259 (S.D.N.Y. 1949) (Kaufman, D.J.). This phrase at the very least is susceptible to and permits at least one rational meaning which the Court should have considered, i.e., non-performance of other contractual obligations. Thus, the cited language is not clearly definitive and the District Court could not interpret properly this language without reference to extrinsic evidence to indicate the meaning of the language. Union Ins. Soc. of Canton, Ltd. vs. William Gluckin & Co., 353 F.2d 946, 951 (2 Cir. 1965).

In sum, by disregarding the evidentiary facts contained in the affidavits of those people who had negotiated the interrelated agreements between the parties, as well as those experts who set forth industry standards, the District Court failed to recognize the very fine distinction between considering, on the one hand, the subjective intent involved in

the use of language (which is not permitted), and, on the other hand, the meaning of language used to express a thought (which is permitted).

The District Court simply failed to recognize the trend of decisional case law in this jurisdiction.

Judge Weinfeld discussed the distinction to be made in Hammond Ford, Inc. vs. Ford Motor Company, 204 F.Supp. 772 (S.D.N.Y. 1962), when he wrote:

"The issue is one of fact--the intention of the parties--to be determined against the background facts and in proper perspective.... While it may be true, as the defendant states, that the issue is not to be resolved by subjective intent, 'in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable. The standard is what a normally constituted person would have understood them to mean, when used in their actual setting.'" (Emphasis supplied.)

In reaching his correct conclusion, Judge Weinfeld was simply elaborating on the often-cited language of Judge Learned Hand in New York Trust Company vs. Island Oil and Transport Corporation, 34 F.2d 655, 656 (2d Cir. 1929):

"It is quite true that contracts depend upon the meaning which the law imputes to the utterances not upon what the parties actually intended but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable. The standard is what a normally constituted person would have understood them to mean when used in their actual setting." (Emphasis supplied.)

In the instant action two things are clear: (1) the language struck by the Court as well as the language ignored

by the Court was not clearly definitive, thereby requiring consideration of extrinsic evidence; and (2) "the normally constituted" persons involved, i.e., the persons privy to the execution of the Songwriter's Agreement, were aware and understood that the contract terms "used in their actual setting" meant that the payment of royalties was not severable from other obligations contained in the Songwriter's Agreement, and that the failure of Melanie to fulfill her artist obligations would work to permit Kama Rippa properly not to make royalty payments to Melanie on August 15th.

By refusing to consider any extrinsic evidence, the Court below perceived no ambiguity as to the interdependency of the several agreements. However, the result of the Court's inquiry would have been different if the Court below admitted the submitted extrinsic evidence. The parole evidence rule did not preclude evidence, of course, of dealing or usage of trade for

"such evidence merely delineates a commercial backdrop for intelligent interpretation of the agreement."  
Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5 Cir. 1971).

Moreover, where, as here, the motion for summary judgment is exclusively predicated upon documentary exhibits

"the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

And, this is particularly true where, as here, "the inferences which the parties seek to have drawn deal with questions of motive,

intent and subjective feelings and reactions." Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (2 Cir. 1971)

See also, Lemelson v. Ideal Toy Corp., 408 F.2d 860 (2 Cir. 1969) and Cali v. Eastern Airlines, Inc., 442 F.2d 61 (2 Cir. 1971), two cases in which the Court reversed the decisions of the district court below on motions for summary judgment where each district court had found no ambiguity existed for certain contractual language.

Under the circumstances of this action involving as it does several interlocking agreements, exploration of the collateral matter on a motion for summary judgment was fundamental to proper interpretation of the contract language. Based on the affidavits submitted below which were improperly excluded by the District Court, there exist genuine issues as to material facts which, under the usual construction of Rule 56 of the Federal Rules of Civil Procedure, requires denial of the motion for summary judgment.

POINT III

SUMMARY JUDGMENT MUST BE DENIED  
WHERE, AS ~~HERE~~, THERE EXIST GENUINE  
ISSUES OF MATERIAL FACT.

Rule 56(c) of the Federal Rules of Civil Procedure,  
28 U.S.C., provides, in pertinent part, that:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This Court has consistently interpreted this Rule to require denial of a motion for summary judgment and the granting to "a litigant . . . a trial where there is the slightest doubt as to the facts. . . ." Doehler Metal Furniture Co. vs. United States, 149 F.2d 130, 135 (2d Cir. 1945). And, as was said in Investors' Insurance Company of America vs. Cirisko, 261 F.Supp. 124 (D.C. Conn. 1966) (Timbers, P.J.)

"In motions for summary judgment predicated upon documentary evidence, 'the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.'" United States v. Diebold, Inc. 369 U.S. 654, 655 (1962); see also, Gordon v. Youmans, 358 F.2d 261, 262 (2d Cir. 1965).

Moreover, where, as in the instant case, credibility of the parties is crucial, summary judgment is particularly inappropriate and a trial indispensable. Arnstein vs. Porter, 154 F.2d 464, 471 (2d Cir. 1946).

The district courts of this Circuit consistently have interpreted Rule 56 in a similar fashion. See United Electrical Radio and Machine Workers of America, etc. vs. General Electric Company, 208 F.Supp. 870, 872 (S.D.N.Y. 1962); Wilner vs. United States, 195 F.Supp. 786 (S.D.N.Y. 1961).

Also, in Marubeni-Iida (America) Inc. vs. Eagle Star Insurance Company, Ltd., 64 Civ. 2409 (March 22, 1967), the Court wrote:

"Concededly, the interpretation of a contract customarily poses an issue of law to be decided by the court. This rule will apply, however, only where there are no material factual issues presented. Where, as here . . . the parties' intention in using such language is subject to bona fide material dispute, parol evidence is admissible to resolve those factual disputes; and, consequently, a motion for summary judgment must be denied."

The Court in Ideal Structures Corp. vs. Levine Huntsville Development Corp., et al, 396 F.2d 913, 928-29 (5 Cir. 1968) correctly noted the extreme care to be exercised with motions for summary judgment:

"the scheduling of trial combat need not suggest the ultimate victor. Rather, it is a recognition that factual questions do exist and that the court should seek out audio as well as visual aids. Generally, on motions for summary judgment courts should not take an astigmatic or myopic view of the fact . . . (Citing cases.). . . . And although statutes of frauds do, in fact, limit the inquiry, there are exceptions to their interdictions, which exceptions can lead up to fairness and good faith."

To the contrary, the Court below abandoned the

"Fundamental maxim that on a motion for summary judgment the Court cannot try issues of fact;

it can only determine whether there are issues to be tried." American Manuf. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 279 (2d Cir. 1967).

Against this backdrop of decisional authority, there are several genuine issues of material fact (other than the questions of the interdependence of the agreements and the meaning of the language of the rider to paragraph 6) each of which, taken alone, requires a full evidentiary hearing on the merits and mandates denial of Melanie's motion for summary judgment. These issues are more fully set forth below.

The District Court correctly acknowledged in its Opinion (at page 9), that, as the Songwriter's Agreement was originally drafted, Melanie's right to receive royalties was dependent on her full performance of her obligations under that Agreement. This conclusion is consistent with the intention of the parties and the custom and understanding in the music industry.

The District Court then ruled, directly contrary to the averments contained in the submitted affidavits, that the riders to the Songwriter's Agreement established that Melanie's right to receive royalties was independent of her obligations to plaintiff (at page 10).

By its very terms, however, the rider to paragraph 6 clearly establishes that it cannot be construed literally and totally apart from the rest of the Agreement.

And all of the factual affidavits corroborated this interpretation (Zynczak Aff't, ¶11; Kass Aff't, ¶11; Poses Aff't, ¶8; Levy Aff't, ¶¶6, 15).

After stating that the payment of royalties when due is of the essence, this rider then provides that if Kama Rippa fails to pay "in accordance with this Paragraph" (emphasis supplied), then the parade of horrors leading to reversion commences. The terms of paragraph 6 of the rider, however, literally do not take account of plaintiff's right under another rider (to paragraph 2(c)), negotiated and added to the agreement at the same time as rider to paragraph 6, to withhold royalties in the event that a copyright infringement lawsuit is brought and Melanie fails to post a bond. Therefore, by its very terms, the rider to paragraph 6 cannot be construed as totally independent from the rest of the Songwriter's Agreement.

Also, if the District Court's construction of the rider to paragraph 6 is correct, the provision of paragraph 12 providing that Melanie's services are unique, exceptional and extraordinary, and a breach by her entitles Kama Rippa to injunctive and other types of relief, is rendered valueless.

Even more fundamental than a literal reading of the rider, however, is the meaning of the often cited language "to a normally constituted person", referring to an individual familiar with generalized industry practice, see, e.g. New York Trust Co. v. Island Oil and Transport Corp., 34 F.2d 655, 656 (2d Cir. 1929).

The parties simply did not create an absolute obligation to pay royalties to Melanie (Kass Aff't, ¶6; Poses Aff't, ¶12). To say that "the payment of royalties when due are of the essence" (as the rider begins) is very different from saying "the payment of royalties hereunder is an absolute obligation" (which the rider does not say).

The language used in the rider also leaves open the question of when royalties are due. As is well known within the popular music industry, if Melanie breached her obligations to plaintiff, no royalties would be due and Kama Ripa would be relieved of its obligation to make royalty payments (Levy Aff't, ¶17). This mutuality of rights and obligations was understood and intended by the parties negotiating the Songwriter's Agreement (Zynczak Aff't, ¶11; Kass Aff't, ¶11; Poses Aff't, ¶8).

Thus, at least two possible breaches are clearly recognized in the Songwriter's Agreement: breach of a warranty of originality or breach of delivery requirements. Yet, neither of these breaches is specifically referred to in the rider to paragraph 6. The parties negotiating the rider did not cross-reference because they knew such specific cross-referencing was unnecessary as they understood that the riders were all an integral part of one, interrelated agreement. All the reciprocal rights and obligations were to be construed together.

By using riders to reflect negotiated changes, moreover, the parties were merely following a time-saving industry practice (Kass Aff't, ¶9; Zynczak Aff't, ¶12; Poses Aff't, ¶¶9, 14; Levy Aff't, ¶16). The use of riders was not intended to set the contents of the riders apart from the rest of the Agreements.

The doctrine cited by the Court (Opinion, pp. 10-11) that conflicts between riders and the original form are to be resolved in favor of the rider simply has no application in this case. It is to be noted that the District Court's decision in this summary judgment motion refers to cases which made "factual determinations", after taking evidence, that the facts compel a conclusion that the riders govern. In the cases cited each Court went outside the challenged agreement to interpret the meaning of the riders and took evidence to determine the parties' intent. Those cases have little to do with the situation now before this Court, except to emphasize the need to consider extrinsic evidence.

In this litigation, there would be a conflict between the rider to paragraph 6 and the original form (which provides, for example, that Melanie's compliance with paragraph 14 of the Songwriter's Agreement is "of the essence") only if the rider creates an absolute obligation of payment. As the parties did not intend to create an absolute obligation,

because they intended Melanie's rights to be contingent on the performance of her obligations, there is no conflict between rider and original.

Although the Court decided (Opinion, p. 11) that the language of the Amendatory Agreement confirmed the Court's interpretation of basically deleting "of the essence" from Melanie's delivery obligations, the Amendatory Agreement in fact has just the opposite effect. In point of fact, "of the essence" was not mentioned in the Amendatory Agreement because it was incorporated by reference, along with other terms and conditions of the Songwriter's Agreement, by the very language of the Amendatory Agreement.

The second paragraph of the Amendatory Agreement specifically provides that the 20 additional musical compositions are to be delivered "under and pursuant to" the Songwriter's and Co-Publishing Agreements. In other words, this paragraph was intended to modify Paragraph 14 of the Songwriter's Agreement only with respect to the number of compositions to be delivered. The other terms of Paragraph 14 remain intact, and are incorporated by the "under and pursuant to" language. Included among these terms patently is the "of the essence" requirement.

In short, the Amendatory Agreement reinforces Kama Rippa's position that Melanie's rights and obligations under the Amendatory Agreement and the Songwriter's Agreement are

interdependent, not independent.

Finally, a helpful gesture by Kama Rippa was interpreted (Opinion, p. 10) as being "proof" that the Amendatory Agreement and the Songwriter's Agreement did not mean what they were intended to mean.

Before Melanie breached her Agreements with Kama Rippa and its affiliated companies, thereby terminating a previously mutually productive relationship, Kama Rippa had advanced monies to Melanie and Schekeryk when they were in financial need.

When, in November, 1973, Schekeryk again came to Kama Rippa pleading abject poverty, Kama Rippa, rather than maintaining its right to withhold payments under the Amendatory Agreement, paid the monies to Schekeryk in order to alleviate his financial distress. It is truly unjust to say that this accommodation was an admission that Kama Rippa had no right to withhold the monies.

In addition to the foregoing aspects of this case, the key factors in its factually complex pattern and the inferences to be drawn therefrom simply do not support resolution of the controversy between the parties by summary judgment:

(1) There are only four people who negotiated the Songwriter's Agreement, the Co-Publishing Agreement and the Artist Recording Agreement and the Amendatory

Agreement. Each of those parties with firsthand knowledge of the true meaning of the language used in the three 1968 agreements submitted to the District Court an affidavit in support of Kama Rippa, except for Beldock who invoked the attorney-client privilege in this connection.

(2) The submitted affidavits show clearly that the parties who negotiated the 1968 agreements clearly understood and intended that the payment of royalties pursuant to paragraph 6 was not an absolute obligation, and that plaintiff's obligation to make payments was contingent upon the full and complete performance by Melanie of all of her obligations under the various agreements (Kass Aff't, ¶¶5, 6, 11; Poses Aff't, ¶¶8, 12; Zynczak Aff't, ¶11).

(3) The understanding of Kass, Poses and Zynczak who negotiated the agreements was an understanding which was consistent throughout the music business (Levy Aff't, ¶6, 15; Franklin Aff't, ¶¶5-6).

(4) The Amendatory Letter Agreement was intended to be, and was clearly by its own terms, interdependent with the Songwriter's Agreement and the Co-Publishing Agreement (Kass Aff't, ¶10; Zynczak Aff't, ¶22; Poses Aff't, ¶20).

(5) Timely release of the minimum of three commercial recordings Melanie was required to deliver pursuant to the Amendatory Agreement was of the essence of the various agreements, including the Songwriter's Agreement, an interpretation which is clear to anyone in the record industry

(Zynczak Aff't, ¶22; Poses Aff't, ¶20; Levy Aff't, ¶13).

(6) Riders were used, among other devices, as a time-saving device in order to reflect negotiating changes in standard agreements. Use of riders, however, was not intended, nor understood, to set the contents of the riders apart from the other reciprocal rights and obligations of the agreements. This time-saving practice is used and understood throughout the music industry (Kass Aff't, ¶9; Zynczak Aff't, ¶12; Poses Aff't, ¶¶9, 14; Levy Aff't, ¶16).

(7) The contents of the rider to paragraph 6 were intended to provide for the payment of royalties on a top priority basis. This rider was not intended, nor was it understood, nor would it be understood, in the music industry to cause a penalizing reversion of valuable copyrights if the payment of money was not made on any specific date (Kass Aff't, ¶8; Zynczak Aff't, ¶14; Poses Aff't ¶¶10-12; Levy Aff't, ¶17).

The Court below did not, as it should have heeded the admonition of this Court in Cali v. Eastern Airlines, Inc., 442 F.2d 65 (1971) when Judge Kaufman wrote:

"...when the court grants summary judgment, it must resolve all ambiguities and draw all reasonable inferences favorable to the party against whom summary judgment is sought, United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962), bearing in mind that the moving party has the burden of showing an absence of any material factual issue for trial.

Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). If undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree, the motion must be denied. Lemelson v. Ideal Toy Corp., 408 F.2d 860 (2d Cir. 1969). 'This admonition should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions.' Empire Electronics Co. v. United States, supra, 311 F.2d at 179." (Emphasis added).

If the Court below had followed the cogent reasoning of the Cali court, this appeal would not be necessary.

POINT IV

THE WITHHOLDING OF ROYALTIES WAS  
PROPER IN LIGHT OF THE ORDER OF  
ATTACHMENT AND CPLR §6204

It is clear that a judicial order will excuse performance where no fault of the party to perform is involved. As is noted in 10 N.Y. Jur., Contracts, §373:

"The rule that performance is excused where it is forbidden by judicial order does not apply where the fault of the party owing the performance contributed to the order, as where his fraud was its basis."

The authors give fraud as a typical contributing fault. There is no fraud or misrepresentation in the case at bar. There is no "fault" of Kama Rippa which contributed to the Order of Attachment. Quite the contrary is true as all judicial requirements were completely and openly fulfilled. The Supreme Court of the State of New York refused to hold plaintiff at fault and, as a consequence thereof, refused to vacate the attachment ab initio, or to award counsel fees.

The logic and cases relied on below by Judge Knapp simply do not support the conclusion reached in this regard by the Court. For example, in Varagnolo v. Partola, 209 App. Div. 347 (1 Dept.), aff'd, 239 N.Y. 621 (1924), the defendants had already breached their agreement when it became impossible to perform. All during the time period

during which performance was required by the contract there was no bar. However, in the instant case, Kama Rippa had thirty days after demand to deliver certain funds. It was during this 30-day period, at a time when Kama Rippa was not in default, that it became legally impossible for Kama Rippa to perform, due to the writ of attachment which had been issued by the State Court.

Likewise, defendants' reliance below on Spanos v. Skouras Theaters Corporation, 364 F.2d 161 (2d Cir. 1966) is unjustified in the present circumstances. In Spanos, the plaintiff had already performed legal services for the defendant and defendant would have been unjustly enriched if it had not paid plaintiff's legal fees. The settlement of the case prior to plaintiff's admission to the bar pro hac vice, was an attempt by defendant to prevent plaintiff from ever asserting his right to the fee that he had earned.

In the instant case, the attachment of the money concededly owed to Melanie in no way prejudiced Melanie's right to receive that money at a future time or, if she needed the funds immediately, to post a bond for the secured amount of money and obtain all of the attached monies. The only effect that the writ of attachment had was to secure jurisdiction and collection of any judgment which Kama Rippa might be awarded against Melanie in the future. Kama Rippa did not prevent the performance of its own contractual obligation. Rather, it attempted to have the Court protect its right to recover a potential judgment against Melanie.

The Spanos case speaks of a party not being "permitted to take advantage of his own wrong and to escape liability for not rendering his promised performance...." It is clear that Kama Rippa did not commit any "wrong" against Melanie. It was merely attempting to protect its right to collect any judgment recovered against Melanie, a person who was consistently in financial distress, in a lawsuit arising from her breach of the various agreements with Kama Rippa.

It should be reiterated at this point that notwithstanding the within argument Kama Rippa believes Melanie's entire argument regarding the attachment to be without merit as a result of Melanie's prior breach of her various agreements with Kama Rippa. In fact, 17 C.J.S. 470, 679 relied on by Melanie below supports this contention:

"the contract is said to be repudiated;  
the other party is not obligated to  
perform and performance of conditions  
precedent on his part is dispensed with."

We see the essence of the argument by Melanie turns against them. One cannot repudiate a contract if prior to that action the other party has breached and repudiated the agreement, which Melanie has done in the circumstances of this case.

In any event, a just Writ of Attachment read in connection with CPLR §6204 acts to do three things: (1) preserve the status quo; (2) establish a bar to payment unless the attachment was void ab initio; and (3) relieve a debtor from payment to a creditor if the debt is held under a sheriff's lien and/or delivered to the sheriff (both are the same).

As a general rule frustration of performance by law or governmental action relieves the promisor for liability for breach. Flaster v. Seaboard Gage Corp., 61 N.Y.S. 2d 152 (N.Y. Supp. 1946); Hamilton Rubber Mfg. Co. v. Greater New York Carpet House, 47 N.Y.S.2d 210 (N.Y. Supp. 1946), aff'd 53 N.Y.S.2d 954, 269 App. Div. 681. The implied aspect of all of this cited authority is that such obstacle shall not be created with fault on the part of the promisor. There is no "fault" on the part of Kama Rippa in this case.

In New York, if a Writ of Attachment issues against a debtor, CPLR §5204 relieves him of liability to pay a creditor. There is no law regarding which party may serve the Writ. There is no policy against a party serving such a Writ on himself provided he satisfied the applicable criteria of New York's Civil Practice Law and Rules. One may serve a Writ to secure in rem jurisdiction. Also, one may serve a Writ to secure assets to be used for judgment satisfaction. If a Writ is proper the assets are legally bound and frozen. If the Writ is subsequently vacated, recourse is had in damages against the undertaking on the attachment; not, as here, against Kama Rippa pursuant to a contract. Kama Rippa did not act in excess of its legal rights; it acted merely in response to Melanie's breach of contract.

A standard treatise states that if the impossibility of performance arises directly or even indirectly from the

acts of the promise, it is a sufficient excuse for nonperformance by the promisor. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned. Nonperformance of a contract in accordance with its terms is excused if performance is prevented by the conduct of the adverse party. 12 Am Jur, Contracts §381.

In Lorillard v. Clyde, 142 N.Y. 456, 37 N.E. 489 (1894), a contract consolidating the interests of plaintiff and defendants provided for the organization of a corporation under the law of New York to operate the business and that the defendants were to have the management of the corporation and business. In consideration thereof defendants were to guarantee to plaintiff a dividend of not less than 7 percent per annum for seven years, and were to receive for such management commissions out of the freights earned. Such corporation was organized but, two years before the end of the seven-year term, was dissolved by the New York courts, because of its alleged non-compliance with statutory requirements, in a suit instituted by the attorney general, but actually instigated and actively carried on by the plaintiff.

The court determined that under the contract defendants' liability to pay the 7 percent dividend to plaintiff depended upon the continued existence of the corporation and terminated when the life of the corporation was extinguished by the judgment of dissolution. Further, under the

circumstances, plaintiff's contention that the causes of the dissolution were the wrongful acts of the defendants, so that they could not interpose the judgment of dissolution as a defense, was not sustainable, the fact being that as between the parties the plaintiff himself must be considered as having procured the dissolution of the corporation. This decision was based on the fact that it appeared that although the corporation had been guilty of certain technical violations of its duty under statutes, they were such violations as could easily have been corrected had notice been given and that no notice had been given to the corporation. Moreover, it was doubtful if the forfeiture proceedings would have been brought at all but for the instigation thereof by the plaintiff, who had been the active promoter of the action.

In light of the foregoing facts, it is clear that Melanie, having breached her obligations under her various agreements with Kama Rippa, cannot now complain of legitimate and reasonable action taken by Kama Rippa as a result of Melanie's actions, to protect its interests and extreme financial investments (Kass Aff't, ¶¶18-24).

POINT V

BEFORE REVERSION SHOULD OCCUR, MELANIE  
MUST COMPLY WITH THE EQUITABLE DOCTRINES  
SET FORTH IN THE RESTATEMENT ON RESTI-  
TUTION, §158.

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The Restatement on Restitution, §158, provides:

"A person is entitled to specific restitution of property from another or to the product of such property only on condition that he compensate the other for expenditures with reference to the subject matter which have inured to his benefit, to the extent that justice between the parties requires."  
(Emphasis added)

The phrase "to the extent justice between the parties requires" has been broadly construed. Thus, even a consciously tortious defendant may be reimbursed for expenses which he has incurred which have increased the value of someone else's property. He may obtain such reimbursement as a defendant in a lawsuit seeking the return of the property even though if he were to bring an independent action to recover his costs, his tortious conduct would act as a bar to such reimbursement. Restatement on Restitution, §158, Comment a.

If the person who is getting back the property desired the improvements which were made, the Restatement takes the position that it is only fair for such person to pay for the cost of the improvements. Restatement on Restitution, §158, Comment d.

In the popular music field, the value of musical copyrights derives from a successful recording of the compositions (Levy Aff't, ¶9; Kahl Aff't, ¶11; Kass Aff't, ¶17, 17A). A successful recording is created both by the artist and the quality and knowledge of the record company's staff. Once a record is a hit, the expertise of the music publisher becomes vital (Kass Aff't, ¶20). In short, for a popular music copyright to become a valuable asset, a recording company and a publishing company must incur substantial expenses creating a sound for the compositions and then advertising and promoting them. In Melanie's case, these expenses total in excess of One Million Dollars (Kass Aff't, ¶23).

Melanie certainly desired these expensive improvements because she receives substantial royalties as a result and shares the publishing rights in and income from the compositions (Kass Aff't, ¶17, 17A). This case is, therefore, squarely within the confines of \$158 of the Restatement.

The most relevant case for the Court's consideration is Grove vs. Grove Valve and Regulator Company, 24 Cal. Rptr. 300 (Ct. of App. 1st Dist. Div. 2 1970).

In that case, plaintiff-appellant sued for injunctive relief and an accounting alleging ownership of 12 patents. The defendant companies cross-claimed, asserting that they owned the patents, as well as 6 additional inventions patented

to the plaintiff. The case revolved around an employment contract between plaintiff and the defendant companies. It also involved misrepresentations by the plaintiff to the Board of Directors of the Company of which he was also a director. Issues of fraud and breach of fiduciary duty were, therefore, present before the Court.

The Court in Grove held that the defendant companies were the owners of the patents in dispute. However, despite plaintiff's questionable conduct, the Court required the defendant companies to reimburse plaintiff for nearly \$65,000.00 in expenses incurred in securing domestic and foreign patents on defendants' inventions before the patents would be transferred to the defendants.

See also Godzieba vs. Godzieba, 143 A.2d 344, 348 Sup. Ct. Penn. 1958) in which an order was modified to require both reimbursement for expenses, and also payment for one-half of the additional value created by improvements to property; Stanko vs. Males, 135 A.2d 392, 395 (Sup. Ct. Penn. 1957); Gray vs. Liebert, 53 A.2d 132, 137 (Sup. Ct. Penn. 1947) in which the Court denied restitution of property to plaintiff since the plaintiff had not tendered to the defendant, who held legal title to the property, reimbursement for the monies which the defendant had spent on preserving and improving the property; and Bowen vs. Morgillo, 23 A.2d 719, 721-722 (Sup. Ct. Conn. 1941).

The Court below stated that these equitable principles do not apply in this case since the Court is ordering specific performance of a contract, not restitution. With all due respect, if the Court ignores the principles governing restitution, it is enforcing a contractual provision which does not exist.

The reversionary language in the rider to Paragraph 6 of the Songwriter's Agreement provides that all rights in the compositions "shall revert to the Writer"; the clause does not provide that the reversion shall be "free and clear" of any claims by plaintiff.

This omission permits, in fact forces, the Court to look to the principles of restitution to determine what conditions, if any, should be imposed on a reversion of copyrights.

At the time the agreements in this case were entered into, the copyrights were relatively valueless. No one knew in 1968 what the value of those copyrights might be. (Poses Aff't, ¶13). It was perfectly logical, therefore, to leave the Rider ambiguous as to conditions to be imposed on reversion. These conditions, if any, would be considered by a court of equity examining circumstances at the time the reversionary clause was invoked.

If the copyrights did not substantially increase in value, Kama Rippa and its affiliated companies would not

have been performing services of significant value to Melanie. A reversion of copyrights in that situation, therefore, without any further claim by Kama Rippa, might not be inequitable.

However, where Kama Rippa and its affiliated companies have, by their joint efforts and expertise, turned the copyrights into valuable assets, it is unthinkable that the copyrights should revert merely because payment of royalties was not made on a specific date, particularly in a situation in which no one in the music industry would expect payment to be made (Kass Aff't, ¶8; Kahl Aff't, ¶6).

Thus, the Court's position that it is merely enforcing specific performance of an agreement ignores the actual contractual language in this case. That language in no way negates the principles of restitution. In this connection, it is interesting to note Industrial Development Foundation vs. United States Hoffman Machinery Corp., 171 N.Y.S.2d 562 (Sup. Ct. Cayuga County 1958), aff'd, (4th Dept. 1959), 183 N.Y.S.2d 1011, cited in the Court's Opinion at pages 13 to 14. The Court cites this case for the proposition that equity will not prohibit a party to a contract from claiming a forfeiture if the contract clearly provides for one.

In that case, however, supra, 171 N.Y.S.2d at 575,  
the contract specifically provided that:

"the cost of such permanent improvements  
should not be charged to the plaintiff  
in the event of the surrender of the  
property to it."

That is language specifically removing the principles of  
restitution from the Court's consideration.

POINT VI

UNDER THE CIRCUMSTANCES OF THIS CASE,  
GRANTING REVERSION WAS AN INEQUITABLE  
AND IMPROPER AWARD.

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Assuming, arguendo, Kama Rippa's attachment was void and did not create a defense to late payment, and also assuming arguendo Melanie's prior breach was not material, this Court nonetheless should not affirm the order for reversion of copyrights because such an order is not required by the terms of the rider to Paragraph 6 of the Songwriter's Agreement. The language of that rider clearly states that the reversionary "provision may be specifically enforced." Reversion is therefore totally within the Court's discretion.

In the circumstances of this case, such reversion would be egregiously inequitable. Quite apart from Melanie's prior breach (which, even if not sufficiently material to be an anticipatory breach, must still be thrown onto the equitable balance), reversion is an inequitable and improper award since Melanie was not deprived or harmed in any significant manner. All royalties were paid to her after a disputed attachment was vacated.

Thus, if the Court were to exercise its discretion, acknowledged and affirmed by the contract, in favor of reversion, it would be acting contrary to the general principles of equity governing specific enforcement and invoked by the language of the rider.

Just recently, this Court recognized that the late payment of royalties for musical compositions does not justify an order for reversion of copyrights. Nolan v. Sam Fox Publishing Co., Inc., 182 USPQ 513 (2d Cir. 1974). In that case, 74% of royalties due on musical compositions had not been paid over a period of years. Defendant admitted that part of these monies had been withheld without any claim of right. Yet the Court held that reversion of copyrights was an improper and inequitable remedy. (182 USPQ at p. 515).

Granted that in the Nolan case there was no contractual provision for possible reversion. But in the present case reversion is contractually within the Court's discretion. And the Nolan case indicates that the Court will not exercise that discretion unless the defendant has committed fraud or has completely failed to pay royalties. (182 USPQ at p. 515).

In the present case there is neither fraud nor a complete failure to pay royalties. There is not even the failure to pay a substantial portion of royalties over a period of years as in the Nolan case. Rather, this Court must consider: Melanie's refusal to acknowledge her obligations under the Amendatory Agreement; her refusal to even discuss an amicable resolution of that dispute; her admitted impecunious position so that payment of royalties would render a liquidated damages provision meaningless; and the payment of all royalties due as soon as a disputed attachment was vacated.

In these circumstances, if the Court exercised its discretion to order reversion of the copyrights, it would unjustifiably be placing Kama Rippa at Melanie's mercy. The Court of Appeals has recognized that this relationship should not be permitted, even if it means refusing to enforce contractual language which appears clear on its face, but which does not really cover the situation in dispute. Gillet v. Bank of America, 160 N.Y. 549, 557 (1899).

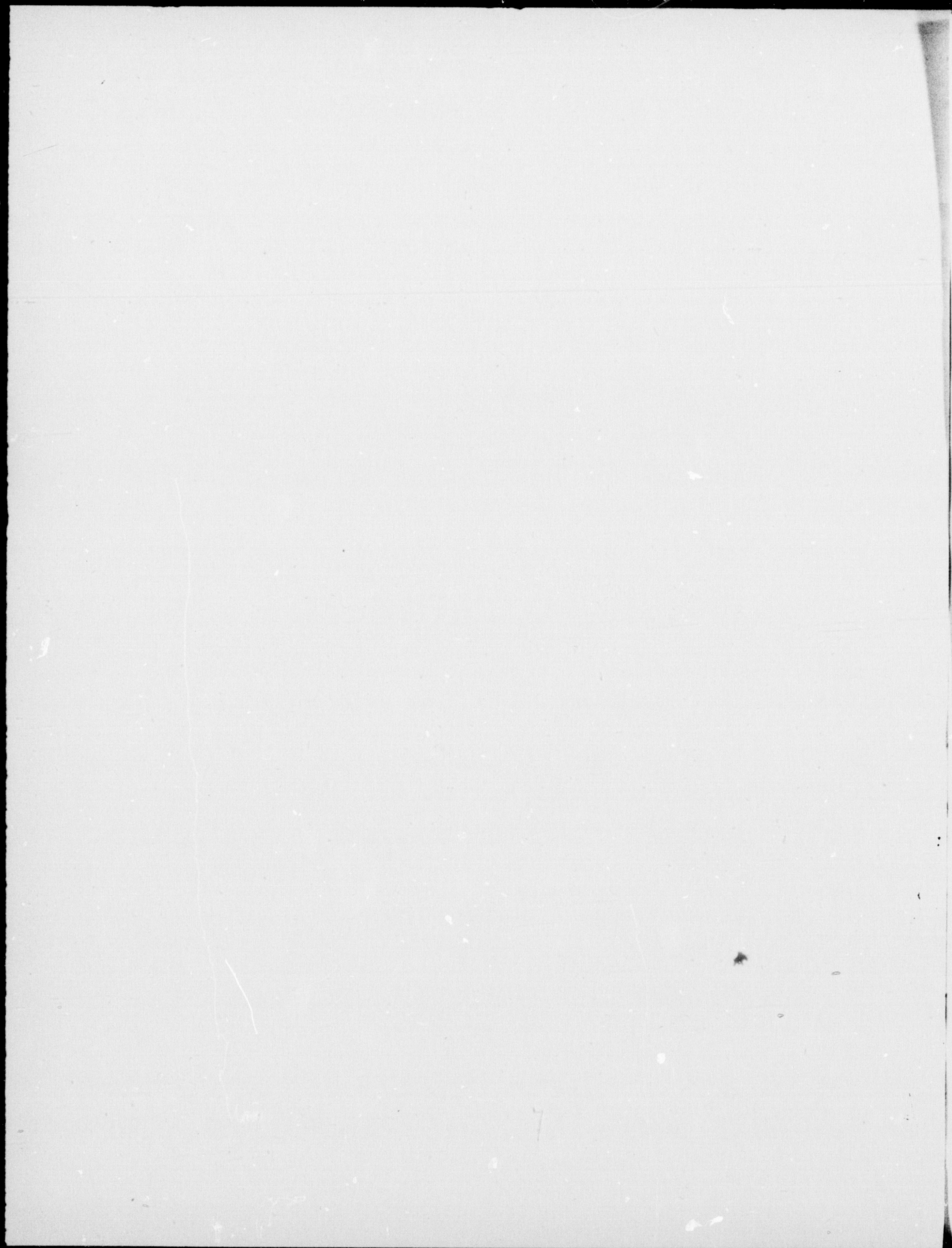
There, the Court of Appeals was faced with the construction of a note given by plaintiff's assignor to defendant bank. The note provided, in pertinent part, that the security deposited with the bank contemporaneously with the making of the note could be held as "collateral security for the payment of this and any other liability or liabilities of the undersigned to the said bank, due or to become due, or which may hereafter be contracted or existing." The note further provided that the maker of the note gave to the bank a lien for the repayment of all such liabilities (not limited to the amount of the note) upon "all the property or securities at any time given unto or left in the possession of the said bank by the undersigned; and, also, upon any balance of the deposit account of the undersigned with the said bank." 160 N.Y. 549, 552.

The bank contended that it could hold the property pledged until payment of a second note of plaintiff's assignor, which the bank purchased from that note's payee. The Court refused to enforce the note in accordance with its terms, stating, 160 N.Y. 549, 559:

"To hold that by the language of this agreement the parties contemplated giving security to the defendant for any and all claims which it might purchase, would be to extend the security to all the outstanding debts of the assignors which the defendant might have the ability and be willing to buy. That the parties intended any such effect by the words employed, we do not believe. Their minds never met upon a provision which would include any such outside transactions, and no such result could have been intended. It is equally obvious that the language of this agreement, when read in the light of the circumstances and facts surrounding the transaction, and when the principles of construction already stated are applied, does not justify the conclusion contended for by the respondent." (Emphasis supplied).

In the case at bar, the parties intended to enforce a reversion of copyrights if Kama Rippa failed or refused, without justification, to make timely payment of royalties. Such a provision is equitable and reasonable. But clearly the parties never even contemplated the complex claims and counterclaims of the present fact pattern. Clearly "their minds never met" upon a provision which would force reversion of copyrights, leaving Kama Rippa defenseless, in the midst of bona fide and justifiable claims for wilfull breach by Melanie of her obligations to Kama Rippa.

Therefore, to exercise discretion to force such a reversion would be to venture far beyond the boundaries of the rider into a realm where equity is unknown.



CONCLUSION

For the foregoing reasons, the Order and Judgment below, dated July 16, 1974, and the Order Upon Reargument, dated July 30, 1974, should be reversed.

Respectfully submitted,

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